

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 JESSE THOMPSON, et al.,

12 Plaintiffs,

13 v.

14 NORTH AMERICAN TERRAZZO,
15 INC., et al.,

16 Defendants.

CASE NO. C13-1007RAJ

ORDER

17
18 **I. INTRODUCTION**

19 This matter comes before the court on a motion to dismiss all individual and class
20 claims by defendants North American Terrazzo, Inc. ("NAT"), Randy Rubenstein, Joe
21 Geiger, Paul Singh, and Shawn Navoa. Dkt. # 14. Plaintiffs Jesse Thompson, Ernesto
22 Martinez, Julio Cesar Romero, Justin Taylor, and Vitaliy Ostapyuk allege the following
23 class and individual claims: (1) disparate treatment and hostile work environment
24 discrimination on the basis of race and national origin under Title VII, Title I of the 1991
25 Civil Rights Act, and the Washington Law Against Discrimination ("WLAD"), (2)
26 outrage, (3) negligence and negligent supervision, (4) negligent infliction of emotional
27

1 distress, (5) wrongful termination or discharge under Title VII and Washington State
2 common law, and (6) violation of the Fair Labor Standards Act (“FLSA”). Dkt. # 1.

3 Plaintiffs concede that they are not pursuing a class action claim in this action.
4 Dkt. # 17 at 12. Plaintiffs also seem to concede that Title I of the 1991 Civil Rights Act
5 does not create a substantive right and is not a basis for an independent claim apart from
6 Title VII, where they have referred to Title I as a “companion” to Title VII. Dkt. # 17 at
7 6; *see* 42 U.S.C. § 1981a (providing for damages in cases of intentional discrimination
8 under Title VII); Pub.L. 102-166, 105 Stat. 1071 (Title I entitled “Federal Civil Rights
9 Remedies”). Accordingly, the court GRANTS defendants’ motion with respect to the
10 class claims and separate cause of action for Title I of the 1991 Civil Rights Act.¹

11 Having considered the memoranda, complaint and the record herein, the court
12 GRANTS in part and DENIES in part defendants’ motion to dismiss.²

13 II. BACKGROUND

14 Plaintiff Thompson, who is African-American, worked at NAT from July 2009 to
15 August 2010 when he was terminated “because his supervisor stated ‘NAT was going to
16 be a worksite for Mexicans only, and there would be no more work for him.’” Dkt. # 1
17 (Compl.) ¶ 4. During his employment, “Thompson was repeated[ly] and openly called a
18 ‘nigger, white wash, black motherfucker, fucking nigger, terron, mayate, and Uncle Tom’
19 by his supervisor, Shawn Navoa[.]” *Id.* Many of these racially derogatory slurs were
20 said in front of another supervisor, defendant Geiger. *Id.* Thompson repeatedly
21 complained to supervisors Geiger and Singh and the owner Rubenstein about these
22

23 ¹ The court notes that plaintiffs may pursue the remedy of damages for intentional
24 discrimination under Title VII pursuant to Title I of the 1991 Civil Rights Act.

25 ² The court notes that the parties have frequently failed to provide basic legal authority to
26 the court, such as the elements of a cause of action. The court will not undertake counsel’s job.
27 Accordingly, the court has limited its analysis to the arguments that are supported by legal
authority. The court also advises the parties that while it is interested in reviewing district court
decisions that are factually analogous in this District, and to a lesser extent in other districts, such
cases are not binding on this court.

1 racially derogatory slurs, but NAT never investigated the complaints, ignored the
2 complaints, allowed the conduct to continue, and terminated Thompson from his
3 employment with NAT after the numerous complaints to management. *Id.* ¶¶ 5-6.

4 Plaintiff Taylor, who is Caucasian-American, worked at NAT from August 2004
5 to October 2010, when he was terminated “because his supervisor stated ‘NAT was going
6 to be a worksite for Mexicans only, and there would be no work for him.’” *Id.* ¶ 7.
7 “Taylor was repeated[ly] and openly called a ‘white boy, honky, white mother****er,
8 and white trash, by his supervisor at NAT.” *Id.* Taylor repeatedly complained to
9 supervisors Geiger and Singh and to owner Rubenstein about Navoa’s comments, but
10 NAT never investigated the complaints, ignored the complaints, allowed the conduct to
11 continue, and terminated Romero from his employment with NAT after his numerous
12 complaints to management. *Id.* ¶¶ 8-9.

13 Plaintiff Ostapyuk, who is Caucasian and of Ukrainian origin, worked at NAT
14 from 2003 to May 2010, when he was terminated “because his supervisor stated ‘NAT
15 was going to be a worksite for Mexicans only, and there would be no more work for
16 him.’” *Id.* ¶ 10. During his employment, “Ostapyuk was repeated[ly] and openly called
17 a ‘white boy, honky, white mother****er, white trash, and Russian motherfucker,’ by his
18 supervisor at NAT.” *Id.* Ostapyuk repeatedly complained to supervisors Geiger and
19 Singh and to owner Rubenstein about Navoa’s comments, but NAT never investigated
20 the complaints, ignored the complaints, allowed the conduct to continue, and terminated
21 Ostapyuk from his employment with NAT after his numerous complaints to management.
22 *Id.* ¶¶ 11-12.

23 Plaintiff Romero, who is Hispanic-American, worked at NAT from October 2009
24 to December 2010 when he was terminated “because his supervisor stated ‘NAT was
25 going to be a worksite for whites only, and there would be no more work for him.’” *Id.* ¶
26 13. During his employment, “Romero was repeated[ly] and openly called a ‘wetback,
27 border jumper, spick, and Mexican cockroach’ by his supervisor[.]” *Id.* Romero

1 repeatedly complained to supervisors Geiger and Singh and to owner Rubenstein about
 2 Navoa's comments, but NAT never investigated the complaints, ignored the complaints,
 3 allowed the conduct to continue, and terminated Romero from his employment with NAT
 4 after his numerous complaints to management. *Id.* ¶¶ 14-15.

5 Plaintiff Martinez, who is Hispanic-American, worked at NAT from September
 6 2008 to August 2010 when he was terminated "because his supervisor stated 'NAT was
 7 going to be a worksite for whites only, and there would be no more work for him.'" *Id.* ¶
 8 16. During his employment, "Martinez was repeatedly and openly called 'wetback,
 9 border jumper, spick, and Mexican cockroach' by his supervisor[.]" *Id.* Martinez
 10 repeatedly complained to supervisors Geiger and Singh and to owner Rubenstein about
 11 Navoa's comments, but NAT never investigated the complaints, ignored the complaints,
 12 allowed the conduct to continue, and terminated Martinez from his employment with
 13 NAT after his numerous complaints to management. *Id.* ¶¶ 17-18.³

14 III. ANALYSIS

15 When considering a motion to dismiss for failure to state a claim under Federal
 16 Rule of Civil Procedure 12(b)(6), "the court is to take all well-pleaded factual allegations
 17 as true and to draw all reasonable inferences therefrom in favor of the plaintiff." *Wylar*
 18 *Summit P'ship v. Turner Broadcasting Sys., Inc.*, 135 F.3d 658, 663 (9th Cir. 1998).
 19 However, the complaint must indicate more than mere speculation of a right to relief.
 20 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[F]or a complaint to survive a
 21 motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from
 22 that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."
 23 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). "Threadbare recitals of
 24

25
 26 ³ Plaintiffs also allege that Navoa, Singh and Geiger are all employees of NAT, and their
 27 conduct as alleged in the complaint occurred during their official duties. *Id.* ¶ 23. As such,
 plaintiffs allege that NAT is vicariously liable for their tortious conduct. *Id.* ¶ 24.

the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009).⁴ Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

A. Race and National Origin Discrimination

1. Title VII

Defendants argue that plaintiffs fail to allege that they have administratively exhausted their Title VII claim. Dkt. # 14 at 4. Defendants cite two Eastern District of California cases for the proposition that when a plaintiff alleges violations of Title VII, he must also allege that he has administratively exhausted these claims and received a right to sue letter from the EEOC. *Id.* This court is not bound by other district court decisions, and defendants have failed to explain why those cases are factually analogous. Notably, defendants do not argue that plaintiffs actually did not exhaust their administrative remedies, or that their complaint was filed untimely. Dkt. # 14 at 4. The court takes judicial notice of the EEOC determinations regarding Thompson's and Martinez's claims, and the notice of right to sue letters from all plaintiffs, which indicate that they filed charges and received right-to-sue letters. Dkt. # 17-3 to 17-6. Since these documents are subject to judicial notice, the court may consider them in addition to the allegations in the complaint. Under these circumstances, defendants are not entitled to dismissal based on a failure to also allege facts demonstrating exhaustion.

Defendants also argue that plaintiffs fail "to articulate the factual basis for their Title VII claim against their former employer, [and that in] the absence of any specifics,

⁴ Plaintiffs rely on outdated legal authority for the Rule 12(b)(6) standard. This court is bound by *Twombly* and *Iqbal*, and plaintiffs' counsel should update his legal authority. Failure to do so in the future may subject counsel to Rule 11 sanctions for presenting the court with arguments not supported by existing law.

1 it is not possible for NAT to determine the nature of Plaintiffs' individual . . . Title VII
 2 claim[.]” Dkt. # 14 at 4. As summarized above in the background section, plaintiffs have
 3 alleged the factual basis of their Title VII claims for disparate treatment and hostile work
 4 environment against NAT. Whether or not those factual allegations are sufficient to
 5 plausibly allege a claim for disparate treatment discrimination or hostile work
 6 environment based on race and national origin is a separate question that defendants have
 7 not addressed.⁵ Dkt. # 14 at 4.

8 Defendants also argue that “the Ninth Circuit has ‘consistently held that Title VII
 9 does not provide a cause of action for damages against supervisors or fellow employees.’
 10 *Id.* (citing *Holly v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1179 (9th Cir. 2003)). Plaintiffs do
 11 not dispute the Ninth Circuit precedent, and this court agrees. Accordingly, the court
 12 GRANTS defendants’ motion with respect to plaintiffs’ Title VII claims against the
 13 individual defendants.

14 2. WLAD

15 Defendants argue that plaintiffs “have failed to articulate the factual basis for their
 16 individual . . . [WLAD] claims against any of the Defendants[, and that absent] specifics,
 17 it is not possible for Defendants to determine the nature of Plaintiffs’ individual . . .
 18 discrimination claims[.]” Dkt. # 14 at 5. The court has already rejected this argument
 19 with respect to Title VII, and the court’s determination applies equally to the WLAD.

20 Defendants also argue that plaintiffs have failed to plead any facts sufficient to
 21 hold any of the individual defendants liable under the WLAD, citing only *Brown v. Scott*
 22 *Paper Worldwide Co.*, 143 Wn. 2d 349, 361 (2001). Dkt. # 14 at 5. In *Brown*, the
 23 Washington Supreme Court held that individual supervisors, along with their employers,
 24 may be held liable for their discriminatory acts. *Id.* The Court construed RCW

25
 26 ⁵ The court notes that plaintiffs appear to rely on the same factual allegations for their
 27 disparate treatment and hostile work environment claims, although plaintiffs present both claims
 under the same heading of discrimination on the basis of race and national origin.

49.60.040(3) to mean that “a supervisor acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts.” *Id.* at 358. The Court also reasoned that the Legislature’s intent to hold supervisors personally liable is manifested in RCW 49.60.220, which makes it an unfair practice for any person to aid, abet, encourage, or incite the commission of an unfair practice, or to attempt to obstruct or prevent any other person from complying with the provisions of the WLAD. *Id.* at 360.

Here, plaintiffs have alleged that Geiger, Singh and Navoa are supervisors. Plaintiffs have also alleged that they reported Navoa’s discriminatory comments and conduct to Geiger, Singh, and owner Rubenstein, all of whom ignored the complaints, failed to take any action, and allowed the discrimination to continue. Under *Brown* and RCW 49.60.220, the court believes these allegations are sufficient to plausibly allege individual liability of the supervisors and the owner.⁶

B. Outrage

Defendants argue that plaintiffs’ outrage claim should be dismissed because it is “virtually identical” to the outrage claim alleged in *Wright v. North American Terrazzo, Inc.*, that Judge Robart dismissed as a matter of law. Case No. C12-2065JLR, Dkt. # 20 at 7-8 (2013 WL 441517 (W.D. Wash. Feb. 5, 2013)), # 33 at 13-15 (June 10, 2013). The court disagrees.⁷ Plaintiffs’ outrage claim, while sharing some common allegations,

⁶ Defendants fail to cite any other legal authority, or otherwise provide any analysis or argument regarding the prima facie elements for disparate treatment and hostile work environment claims under the WLAD. The court declines to undertake such an analysis *sua sponte*.

⁷ This court respectfully disagrees with the *Wright* court to the extent that it can be construed to mean that a supervisor that repeatedly spews racially charged and racially hostile comments at employees, as a matter of law, is not sufficiently extreme or outrageous to survive a motion to dismiss. *See Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 741, 565 P.2d 1173 (Wash. 1977) (“When one in a position of authority, actual or apparent, over another has allegedly made racial slurs and jokes and comments, this abusive conduct gives added impetus to the claim of outrageous behavior.”).

1 allege much more egregious conduct here. In *Wright*, there was only one plaintiff, and
 2 his outrage claim consisted of an allegation that the defendants “repeatedly called the
 3 plaintiff ‘white boy’ and stated that they were going to get rid of all the ‘white
 4 motherfuckers’ and make the site a minority run site only” and that defendants called
 5 other workers racially disparaging names. Dkt. # 20 at 7 (2013 WL 441517 at *4), # 33
 6 at 14-15. Here, there are five plaintiffs and each of them has alleged that their supervisor
 7 repeatedly used racial slurs, racially charged language, and other offensive and hostile
 8 statements including, “nigger, white wash, black motherfucker, fucking nigger, terron,
 9 mayate, and Uncle Tom[,]” “white boy, honky, white mother****er, and white trash[,]”
 10 “Russian motherfucker,” “wet back, border jumper, spick, and Mexican cockroach.”

11 The court finds that these allegations are sufficient to plausibly allege extreme and
 12 outrageous conduct to survive a motion to dismiss. *See Contreras*, 88 Wash. at 741
 13 (“When one in a position of authority, actual or apparent, over another has allegedly
 14 made racial slurs and jokes and comments, this abusive conduct gives added impetus to
 15 the claim of outrageous behavior.”).

16 **C. Negligence & Negligent Supervision**

17 Defendants argue that plaintiffs have failed to provide sufficient factual allegations
 18 that defendants are subject to liability for negligently failing to properly train and
 19 supervise its employees, and for failing to adequately investigate and discipline those
 20 employees and supervisors. Dkt. # 14 at 7. Defendants do not provide the court with any
 21 legal authority to support their substantive argument.⁸ Accordingly, the court has
 22 disregarded it.⁹

24 ⁸ The court notes that it appears that plaintiffs have plausibly alleged a claim for
 25 negligent supervision where they allege that supervisor Navoa made numerous racially-charged,
 26 abusive, and offensive comments to plaintiffs, that other supervisors and the owner were told
 27 about Navoa’s conduct, that the supervisors and owner failed to take any action to remedy
 Navoa’s conduct and allowed the discriminatory verbal abuse to continue, and that plaintiffs
 were harmed by Navoa’s conduct and the inaction of the other supervisors and owner. *See Niece*

1 **D. Negligent Infliction of Emotional Distress**

2 Defendants argue that the court should follow the reasoning in *Wright*, and dismiss
 3 plaintiffs' negligent infliction of emotional distress claim for failure to allege facts
 4 demonstrating a mental or emotional disorder, such as neurosis, psychosis, chronic
 5 depression, phobia, or any other type of severe disabling emotional or mental condition
 6 which may be generally diagnosed by professionals trained to do so. Dkt. # 14 at 7
 7 (citing 2013 WL 441517). Plaintiffs concede that they must allege facts demonstrating
 8 objective symptomology. Dkt. # 17 (Opp'n) at 8 (citing Washington Supreme Court
 9 cases for the proposition that a plaintiff may recover for negligent infliction of emotional
 10 distress if she proves duty, breach of the standard of care, proximate cause, damage, and
 11 objective symptomology).

12 The *Wright* court relied on *Hegel v. McMahon*, which confirmed that negligent
 13 infliction of emotional distress claims require plaintiffs to demonstrate objective
 14 symptoms of their emotional injury. 136 Wash. 2d 122, 126, 960 P.2d 424 (Wash. 1998).
 15 The Court held that to satisfy the objective symptomology requirement, a plaintiff's
 16 emotional distress must be susceptible to medical diagnosis and proved through medical
 17 evidence. *Id.* at 135. The Court also noted that examples of emotional distress would
 18 include neuroses, psychoses, chronic depression, phobia, shock, post traumatic stress
 19 disorder, or any other disabling condition. *Id.* n. 5.

20
 21
 22 *v. Elmview Group Home*, 131 Wash. 2d 39, 48-49, 51, 929 P.2d 420 (Wash. 1997) ("employer is
 23 not liable for negligent supervision of an employee unless the employer knew, or in the exercise
 24 of reasonable care should have known, that the employee presented a risk of danger to others";
 "theory of negligent supervision creates a limited duty to control an employee for the protection
 of third-parties, even where the employee is acting outside the scope of employment").

25 ⁹ Neither party has addressed whether plaintiffs' claim for "negligence" is the same as
 26 plaintiffs' claim for "negligent supervision." Since plaintiffs have not distinguished between the
 27 two, the court construes plaintiffs' complaint to only allege a claim for negligent supervision. If
 plaintiffs believe that these two claims should be distinct, they should make that clear in their
 amended complaint.

1 Here, plaintiffs allege that “defendants negligently caused the plaintiffs to suffer
2 severe emotional distress that was supported by objective symptomology diagnosed by a
3 doctor, psychiatrist or psychologist” Dkt. # 1 ¶ 51. However, plaintiffs have not
4 alleged the factual basis underlying the threadbare recitals of the elements and conclusory
5 statements that the severe emotional distress was supported by objective symptomology
6 diagnosed by a doctor. Accordingly, plaintiffs have not plausibly alleged a claim for
7 negligent infliction of emotional distress. Nevertheless, the court believes leave to amend
8 is appropriate to allow plaintiffs the opportunity to allege the factual basis for their claim.

9 **E. Wrongful Discharge**

10 Defendants argue that plaintiffs fail to identify the nature or source of the
11 employment contract, the dates of alleged employment, the collective bargaining
12 agreement between the Union and NAT, or any document that could create a contractual
13 relationship between plaintiffs and defendants. Dkt. # 14 at 8. Defendants have failed to
14 provide the court any legal authority that would require plaintiffs to allege any of these
15 facts for a wrongful discharge claim. Accordingly, the court has disregarded these
16 arguments.

17 Defendants also argue that under Washington law, there is no covenant of good
18 faith and fair dealing in the employment context, citing *Thompson v. St. Regis Paper Co.*,
19 102 Wn. 2d 219 (1984). Dkt. 14 at 8. The *Thompson* court created a cause of action in
20 tort for wrongful discharge of an employee where there is a violation of a clear mandate
21 of public policy. 102 Wn. 2d at 233. In creating this narrow exception to the
22 employment-at-will doctrine, the Court declined to adopt a “bad faith” exception to the
23 employment-at-will rule which would have implied a covenant of good faith and fair
24 dealing in every employment contract. *Id.* at 227-28. Plaintiffs do not dispute that
25 Washington courts do not recognize a covenant of good faith and fair dealing in the
26 employment context. Accordingly, defendants are entitled to dismissal of the wrongful
27 discharge claim to the extent it relies on a covenant of good faith and fair dealing. Dkt. #

1 ¶ 55 (“The plaintiffs also had . . . an implied covenant of good faith and fair dealing
2 with the defendants.”).

3 **F. FLSA**

4 Defendants argue that the court should dismiss plaintiffs’ FLSA claim as time-
5 barred, as the court did in *Wright*. Dkt. # 14 at 8-9. In *Wright*, the court dismissed
6 plaintiff’s FLSA claim based on the two-year statute of limitations because plaintiff had
7 not alleged that defendant’s conduct was “willful” as contemplated by the FLSA. Case
8 No. C12-2065JLR, Dkt. # 33 at 10 (citing 29 U.S.C. § 255(a) & *McLaughlin v. Richland*
9 *Shoe Co.*, 486 U.S. 128, 131 (1988)).

10 An action under the FLSA “must be commenced within two years ‘except that a
11 cause of action arising out of a willful violation may be commenced within three years
12 after the cause of action accrued.’” *McLaughlin*, 486 U.S. at 129. A defendant acts
13 willfully under the FLSA if it knew or showed reckless disregard for the matter of
14 whether its conduct was prohibited by the FLSA. *Id.* at 130-31. If an employer acts
15 unreasonably, but not recklessly, in determining its legal obligation under FLSA, its
16 action is not willful. *Id.* at 135 n.13.

17 Plaintiffs allege that NAT (1) “intentionally and purposefully den[ied] overtime
18 pay which had been owed to plaintiffs”; and (2) “intentionally, purposefully, subjectively
19 and arbitrarily reduced the plaintiffs’ hourly salary and their job description based on
20 arbitrary and capricious decisions” Dkt. # 17 (Opp’n) at 9-10 (citing Compl. ¶¶ 59-
21 60). These allegations fall short to plausibly allege the application of the three-year
22 statute of limitations because they do not allege the factual basis for NAT’s knowledge or
23 reckless disregard that its conduct was prohibited by the FLSA.

24 Plaintiffs do not dispute that their FLSA claim is barred by the two-year statute of
25 limitations. Accordingly, the court dismisses plaintiffs’ FLSA claim without prejudice.
26
27

IV. CONCLUSION

For all the foregoing reasons, the court GRANTS in part and DENIES in part defendants' motion to dismiss. The court dismisses with prejudice plaintiffs' (1) class claims, (2) Title I of 1991 Civil Rights Act claim, (3) Title VII claim against all individual defendants, and (4) wrongful discharge claim, but only to the extent that it relies on an implied duty of good faith and fair dealing. The court dismisses without prejudice plaintiffs' claims for (1) negligent infliction of emotional distress and (2) FLSA violation. Plaintiffs may file a First Amended Complaint consistent with this order no later than twenty-one (21) days from the date of this order.

Dated this 19th day of May, 2014.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Judge